SUPREME COURT, U.S.
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No. 88-244

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

JOHN D. OLITSKY,

Petitioner,

v.

SPENCER GIFTS, INC.,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

REPLY BRIEF OF PETITIONER

HAL K. GILLESPIE
HICKS, GILLESPIE, JAMES, ROZEN & PRESTON, P.C.
One Mockingbird Plaza, Suite 760, LB 127
1120 W. Mockingbird Lane
P.O. Box 560388
Dallas, Texas 75356-0388
(214) 630-8621
Counsel for Petitioner, John D. Olitsky

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
ARGUMENT	1
The Fifth Circuit's § 706(b) Holding Cannot Be Sidestepped	1

TABLE OF AUTHORITIES

CASES — Page

Geromette v. General Motors Corp., 609 F.2d 1200 (6th Cir. 1979) 3
Marks v. Prattco, Inc., 607 F.2d 1153 (5th Cir. 1979) 3
Olitsky v. Spencer Gifts, Inc., 842 F.2d 123 (5th Cir. 1979) ..... *passim*
Tulloss v. Near North Montessori School, 776 F.2d 150 (7th Cir. 1985) 2

STATUTES

42 U.S.C. § 2000e-5(b), Title VII, § 706(b) ..... *passim*

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REPLY BRIEF OF PETITIONER

ARGUMENT

The Fifth Circuit's § 706(b) Holding Cannot Be Sidestepped

Respondent does not spend a word justifying the Fifth Circuit's § 706(b) holding. Spencer Gifts devotes its space to a vain suggestion that the *Olitsky* decision will be read as a commonplace holding on compromise offers or hearsay evidence. Any reader of the Fifth Circuit's *Olitsky* decision must deal, as Spencer Gifts would not in its brief to this Court, with this fact: A major ADEA

verdict has now been reversed *solely* on the basis that § 706(b) of Title VII excludes matters in the EEOC's ADEA investigative file—before any informal, much less formal, finding that would trigger the § 706(b) conciliation efforts in a Title VII case.

Respondent begins by asserting that "courts have never applied such an artificial 'before/after' distinction even in Title VII cases." Though it is not "artificial," the fact that no court has previously discussed the distinction is natural enough, since the statute is plain—before a finding of reasonable cause, § 706(b) does not apply. No court has previously ruled that § 706(b) of Title VII applies in an ADEA action; and no court, even in a Title VII context, has ruled statements (whether factual or of an admission nature) inadmissible based upon § 706 (b) of Title VII in advance of an informal, much less formal, finding of reasonable cause—the triggering language of the statute. Respondent ends by noting that "no other circuits have ruled on the application of § 706 (b) to the ADEA." Brief of the Respondent in Opposition to the Petition, pp. 6 and 8. This belated concession illustrates the impact of *Olitsky*.

Spencer Gifts in no way minimizes the *Olitsky* decision by citing the Court to *Tulloss v. Near North Montessori School*, 776 F.2d 150 (7th Cir. 1985). *Olitsky* is far different from *Tulloss*. *Tulloss*, a Title VII case, did not hold that any portion of an investigative file was inadmissible due to § 706(b). If anything, *Tulloss* underscores the extreme nature and effect of the Fifth Circuit's *Olitsky* decision by stressing that, wholly without regard to § 706(b), the decisions as to which portions of the investigative file to admit or exclude from evidence are left to the discretion of the district judge. Similarly, Respondent's efforts to distinguish Title VII cases cited by *Olitsky* have no bearing on the issue before

the court. Respondent cannot distinguish *Marks v. Prattco, Inc.*, 607 F.2d 1153 (5th Cir. 1979) and *Geromette v. General Motors Corp.*, 609 F.2d 1200 (6th Cir. 1979), because the evidence included "factual" file materials as opposed to "admissions or self-appraising statements."[1] *Marks* and *Geromette* both illustrate the law prior to the *Olitsky* decision—no materials in the investigative file, prior to a finding of reasonable cause, are excluded under § 706(b) of Title VII.

In another effort to minimize the impact of the Fifth Circuit's § 706(b) holding in *Olitsky*, Respondent incorrectly states that on appeal, Petitioner failed to respond to the Company's assertion that admission of comments made during compromise negotiations violates Rule 408 and that this constitutes a "tacit admission" that Rule 408 bars this evidence. To begin with, no practitioner citing *Olitsky*, nor court applying it, could avoid its § 706(b) holding. The Fifth Circuit ruled squarely upon § 706(b) and by noting Respondent's Rule 408 argument, yet giving it no weight, clearly rejected it. *Olitsky v. Spencer Gifts*, 842 F.2d 123, 126. In fact, in Olitsky's brief to the Fifth Circuit, Petitioner rejected Spencer Gifts' Rule 408 argument as misguided. Fifth Circuit Brief of Appellee-Cross Appellant, p. 36. As stated in oral argument by counsel for Petitioner before the Fifth Circuit, the notes containing Ron Mangel's comments had nothing to do with compromise negotiations. The page from Plaintiff's Exhibit 36 quoting Ron Mangel as saying that "he can't rebut if McNally was promoted,"

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[1] An argument that "factual" file material survives, but "admissions or self-appraising statements" must be excluded under § 706(b) of Title VII is completely without authority and logic. Section 706(b) simply does not come into play to exclude *any* file materials until a certain point in the process is reached. Moreover, Mangel's statement—that Spencer Gifts could not rebut—is a factual admission.

did not contain a single word about money, settlement offers, or compromises. In short, the Rule 408 argument that was not accepted by the Fifth Circuit is as hollow as Spencer Gifts' effort to obtain reversal in an ADEA case based upon § 706(b) of Title VII, the attack the Fifth Circuit endorsed.

Finally, Respondent may not plausibly contend the Fifth Circuit's § 706(b) holding lacks potential for clouding jurisprudence under the ADEA or Title VII on grounds that Investigator J. Johnson's summaries are hearsay and could not be used as an admission against Spencer Gifts' interest. Once again, the express holding of the Fifth Circuit was that the admission of evidence in question was error because of §706(b) of Title VII—not because the statement failed to qualify as an admission against interest and should have been excluded as hearsay. Again, the Fifth Circuit rejected the hearsay argument by mentioning it but holding strictly on the basis of § 706(b), *Id.* at 126, and by characterizing the statements by Mangel in the EEOC conciliation file "as a virtual concession of liability by Spencer Gifts." *Id.* at 127. Respondent's assertion that investigator Johnson's summaries could not be admissible as an admission as an exception to the hearsay rule, besides charting a course the Fifth Circuit declined in its *Olitsky* decision, is patently untenable under Rules 803(6) and (8) and 804(b)(3), F.R.C.P.

Given the landmark nature of a ruling that § 706(b) applies to exclude evidence and require reversal of major ADEA actions, and that § 706(b) applies in advance of a formal or even informal finding of reasonable cause, we respectfully request this Court to address the issues now, before other courts adopt all or part of the *Olitsky* ruling, defeating the investigative function of the EEOC, grossly and unnecessarily complicating trial proceedings,

and greatly undermining the discrimination proof mechanism approved by this Court.

Respectfully submitted,

HAL K. GILLESPIE
HICKS, GILLESPIE, JAMES,
ROZEN & PRESTON, P.C.
One Mockingbird Plaza,
Suite 760, LB 127
1420 W. Mockingbird Lane
P.O. Box 560388
Dallas, Texas 75356-0388
(214) 630-8621
Counsel for Petitioner,
John D. Olitsky